Wallace on Building and Civil Engineering Standard Forms at page 106 describes this failure to be nothing more than a technical breach of contract by the contractor.

Slesser L.J. in *Prestige* v. *Brettell*,[10] page 346 had this to say: —

"I read the case of *Brodie* v. *Cardiff Corporation*[11] where this matter was fully considered, in substance to mean this. Where an arbitrator having jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter he may by that decision himself supply the deficiency, and do that which ought to have been done."

— see also in this connection *Hudson's* Building and Engineering Contracts, 10th Edition, 437.

Finally in view of the aforementioned authorities in my view the claimants' failure to serve notice under Clause 23 does not in law amount to a waiver of their rights under that clause.

The answer to this question is in the negative.

In answering the aforementioned questions I have confined myself only to the points of law on which guidance was sought and I have refrained from taking into consideration certain facts pertaining to these questions in arriving at my conclusions although the submissions did where necessary refer to such facts as these matters are for determination by the arbitrator.

Questions answered.

Solicitors: *Donaldson & Burkinshaw; Shook Lin & Bok.*

MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. OOI KHAI CHIN & ANOR.

[F.C. (Suffian L.P., Gill C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Raja Azlan Shah and Wan Suleiman F.J.J.) May 15 and August 19, 1978]

[Kuala Lumpur — Federal Court Criminal Appeal No. 39 of 1977]

Criminal Law and Procedure — Appeal — Appeal from acquittal by jury — Summing-up of trial judge — Credibility of witnesses — Appeal dismissed — Criminal Procedure Code (F.M.S. Cap. 6) s. 229 — Courts of Judicature Act, 1964, s. 50 — Federal Constitution, art. 7(2).

Precedent — Former decision of Federal Court not followed — Earlier decision given in error — Courts of Judicature Act, 1964, s. 50.

Constitutional Law — Appeals against acquittal — Federal Constitution, art. 7(2).

In this case the respondents had been charged for an offence under the Dangerous Drugs Ordinance, 1952 and tried before a judge and jury. The jury unanimously returned a verdict of not guilty and the respondents were acquitted. The Public Prosecutor then appealed against the acquittal.

Held: (1) the Federal Court had jurisdiction to entertain the appeal;

(2) the verdict in this case depended entirely on the weight to be given to the conflicting versions from the evidence and as there was nothing wrong in the summing-up, the appeal should be dismissed.

Public Prosecutor v. *Tai Chai Geok*[1] considered no longer good law.

Cases referred to:-

(1) *Public Prosecutor* v. *Tai Chai Geok* [1978] 1 M.L.J. 166.

(2) *Bombay Government* v. *Abdul Wahab* A.I.R. 1946 Bom. 38.

(3) *Ramanugrah Singh* v. *King-Emperor* 73 I.A. 174.

(4) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.

The following cases were also cited in argument: *R.* v. *Reynolds* [1950] 1 K.B. 606, 608; *Jusoh bin Awang* v. *Public Prosecutor* [1950] M.L.J. 69; *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16, 17; *Joseph Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

FEDERAL COURT.

Mohammed Nor bin Haji Ahmad (Deputy Public Prosecutor) for the appellant.

R. Rajasingam for the first respondent.

R.C. Murugeson for the second respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court) (read by Gill C.J. (Malaya)): The two respondents were jointly charged as follows:

"That you at about 6.45 p.m. on 22nd May, 1975 at Kheng Chew Temple, Muntri Street, Penang, in the District of Georgetown, in the State of Penang, together with another person still at large in furtherance of the common intention of you all, did, on your own behalf traffic in a dangerous drug, to wit, heroin weighing 2,863.127 grammes and you thereby committed an offence punishable under sub-section (2) of section 39B of the Dangerous Drugs Ordinance No. 30 of 1952 read with section 34 of the Penal Code."

The jury unanimously returned a verdict of not guilty and in accordance with section 229 of the Criminal Procedure Code the learned trial judge had

no alternative but to acquit and discharge the two accused. That section reads:

"If the verdict is not guilty either unanimously or by a majority the judge shall record judgment of acquittal."

The Public Prosecutor appealed against the acquittal.

Formerly no appeal lay from acquittal by the High Court, for section 50(1) of the Courts of Judicature Act, 1964, then provided: —

"The Federal Court shall have jurisdiction to hear and determine any appeal by a person *convicted* by any High Court in the exercise of its original criminal jurisdiction,..."

The italicized word clearly showed that it was not possible for the Public Prosecutor to appeal from an acquittal by the High Court in the exercise of its original criminal jurisdiction.

Then in 1976 Parliament by Act A328 amended with effect from January 23, 1976, the above section to enable the Public Prosecutor to appeal against an acquittal by the High Court. The section now reads:

"(1) The Federal Court shall have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of —

(a) its original criminal jurisdiction;

(b) ....

subject to this or any other written law regulating the terms and conditions upon which criminal appeals may be brought.

....

(2A) An appeal by the Public Prosecutor shall be either against *acquittal* or sentence...."

There are two issues here. First, do we have jurisdiction to entertain this appeal? Second, if we do, should we allow it?

The Public Prosecutor maintains that this court has jurisdiction to entertain this appeal under the amended section, while the respondents contend that this court has no jurisdiction, citing in support a recent decision of ours, *Public Prosecutor* v. *Tai Chai Geok*.[1]

Having carefully reconsidered this matter, we have come to the conclusion that we were in error in *Public Prosecutor* v. *Tai Chai Geok*[1] when we held that this court had no jurisdiction to quash an acquittal following the verdict of not guilty by a jury.

A person may be acquitted by the High Court:

(a) after a trial before a judge sitting alone; or

(b) after a trial before a judge sitting with assessors (in Sabah and Sarawak); or

(c) after a trial before a judge sitting with a jury (in Peninsular Malaysia only).

In the case of (a) if the court finds the accused not guilty it must acquit, section 183(i) of the Criminal Procedure Code.

In the case of (b), the court may acquit in accordance with or contrary to the opinion of the assessors, section 198 of the Criminal Procedure Code.

In the case of (c), as already noted, the court has no alternative but to acquit should the jury find the accused not guilty.

It is plain that the Public Prosecutor can appeal against the acquittal in (a), by virtue of the amended section 50 of the Courts of Judicature Act.

In our judgment, it is equally quite plain that the Public Prosecutor can do the same in the case of an acquittal after trial with the aid of assessors or with a jury. The new subsection (2A) of section 50 cannot have been clearer: it says quite flatly that the Public Prosecutor can appeal against an *acquittal*, which, in our view, must mean *any* acquittal, not only an acquittal before a judge sitting alone.

It is conceivable that in the case of (b) the acquittal if in accordance with the opinion of the assessors, was as a result of the wrong questions having been put for their opinion, or, if contrary to their opinion, as a result of misapprehension by the trial judge of the legal effect of that opinion. In the case of (c), it is conceivable that the jury returned a verdict of not guilty as a result of serious misdirection by the trial judge. The legislature clearly intended that in these circumstances the Public Prosecutor should have the right to appeal.

The words "subject to this or any other written law" in subsection (1), which we thought referred to section 229 of the Criminal Procedure Code, do not on reconsideration refer to that section at all. Those words are immediately followed by the words "regulating the terms and conditions upon which criminal appeals may be brought", and it is clear to us that they refer not to written law generally, but to written law such as rules of court dealing specifically with, for instance, the necessity for leave, the time limit within which notice of appeal must be lodged and grounds of appeal filed, and things of that kind of regulating *the terms and conditions upon which criminal appeals may be brought.*

Article 7(2) of the Constitution which we mentioned in passing in *Tai Chai Geok*[1] does not prohibit appeals against acquittal; on the contrary it impliedly *allows* a court to order the retrial of a person who has been acquitted.

Nor is an appeal against acquittal following a not-guilty verdict by a jury unique and unprecedented, as we thought in *Tai Chai Geok*,[1] for a similar provision exists in India, see section 411A(2) of the Indian Criminal Procedure Code which reads:

"(2) Notwithstanding anything contained in section 417, the (State) Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction (including an order of acquittal following a verdict of not guilty by a jury)."

and an example of such an appeal is *Bombay Govt.* v. *Abdul Wahab*.[2]

In India there is also provision — section 307 of the Criminal Procedure Code — enabling a judge who disagrees with the not-guilty verdict of a jury to stay the proceedings and submit the case to the High Court if he thinks it necessary for the ends of justice to do so. For an example of a submission under this provision, see the Privy Council case of *Ramanugrah Singh* v. *King-Emperor*.[3]

Having decided that we have jurisdiction to entertain this appeal, what do we do about Encik Mohd. Nor's submission that the trial was not satisfactory, that defects and errors which arose in the course of

the trial misled the jury into bringing in a wrong verdict which cannot be supported, having regard to the evidence? He said that the evidence against the accused was overwhelming and the prosecution witnesses were not shaken, that the defence was a mere denial, that police witnesses were alleged to have been armed but they were not cross-examined on this point, that there has been a miscarriage of justice, that if properly directed the jury might have returned a verdict of guilty, and that in the circumstances this court should order a retrial.

With respect, we would in determining this appeal follow the principle stated by Chagla J. as he then was, in *Bombay Government* v. *Abdul Wahab,*[2] *supra* at page 41:

"It must be remembered that we are dealing with a unanimous verdict of not guilty arrived at by the jury... and the court must always be reluctant to interfere with a verdict of the jury especially when it is a unanimous verdict. The court must be satisfied that it is a perverse verdict, and the line of demarkation between a perverse verdict and an erroneous appreciation of evidence must be clearly and sharply drawn. The court must be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that we reading the evidence might have come to a conclusion different from the one that the jury arrived at. We must be satisfied that the only possible view on the evidence was the view that the accused was guilty and that the jury were manifestly perverse in the decision at which they arrived."

What is the evidence in this case? The police had certain information, so they set up an ambush outside a temple in Penang. In due course the expected car arrived in the temple compound, driven by the first respondent with a passenger on the front seat and the second respondent at the back. The police witnesses called were emphatic that they saw the first respondent get out of the car, go to the boot from which he took out a blue bag, and walk towards the entrance of the temple. As he approached it, he was arrested, whereupon he dropped the bag. The police picked up the bag and opened it in front of everybody concerned including the first accused, and it was found to contain ten packets. A Chemist report showed that the packets contained heroin.

The front-seat passenger escaped and was never arrested. The second respondent attempted to escape but was arrested; nothing was found on him.

In defence the first respondent, a foundry proprietor in Alor Star, said that when they arrived at the temple they went inside, that when coming out they were suddenly confronted by four or five armed men and he was arrested and that he did not have the blue bag with him, that when they arrived at an office which turned out to be the Central Narcotic Bureau the packages were opened and there for the first time he saw some white powdery substance in them.

The second respondent said that he was the first respondent's employee, that he happened to go to Penang that day on a sight-seeing trip on his employer's invitation, that they went to the temple and that on coming out they were arrested.

Both of them said that the third man in the car was a Malay, Said.

Thus it will be seen that the evidence is conflicting, that it is purely oral on both sides, supported on the prosecution side by the production of the blue bag and its contents, and that apart from this, there is nothing to corroborate the oral evidence. Thus the jury simply had to decide which version to believe. If they had found the first respondent guilty, it would have been wrong of us to interfere, as there was evidence which if believed would have justified that verdict. But as it happened, they believed the defence version or thought that it cast a doubt on the prosecution case. In these circumstances it would have been equally wrong of us to substitute our finding for theirs, considering that this is purely a matter of credibility and they saw and heard the witnesses and were in a better position than this court which only has their evidence in cold print, to judge the weight to be accorded to their testimony.

The evidence against the second respondent is very much less strong than that against the first. He was only a passenger in the back seat, though it is true that he attempted to run away when confronted by the police.

The first accused called two witnesses in his defence. In the course of examination-in-chief defence counsel referred to previous statements, exhibits D9 and D10, which they had made and the learned trial judge admitted them for the purpose of impeaching their credit, and Encik Mohd. Nor before us submitted that the learned judge was in error in admitting them without following the procedure so clearly set out by Taylor J. in *Muthusamy* v. *Public Prosecutor.*[4] We have carefully scrutinized these statements in the light of the evidence given in court by these witnesses and come to the conclusion that even if they had been ignored and regard been had only to the evidence they gave in court, it would have made very little difference. In any event the learned judge did tell the jury to ignore them, though it is true that he also advised them to ignore the evidence they gave in court.

As the verdict depends entirely on the weight to be given to the conflicting versions, and as there is nothing wrong in the summing-up, we are of the opinion that in these circumstances we should not disturb the finding and accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: *Rajasingam & Co.; R.C. Murugeson.*